The appellant should not be prevented from pursuing its petition so that the court would be able to consider all evidence and determine whether it should exercise its discretion to order winding-up or not.

Relevant to this appeal is that part of the judgment in *Chip Yew Brick Works Sdn Bhd*[6] which appears at pp 448 and 449:

> Even where the whole amount of debt claimed is disputed, the court can allow evidence to be adduced to enable it to consider whether or not there was a bona fide dispute and the court is competent to go into the evidence to consider that question for the purpose ultimately of determining whether it should exercise the discretion: *Re Welsh Brick Industries Ltd* [1946] 2 All ER 197.

Appeal allowed

Solicitors: *Allen & Gledhill; Murthi & Partners.*

Reported by *Prof Ahmad Ibrahim*

Ker Chee Chuan v Katlyn Enterprise (M) Sdn Bhd

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-128 OF 1990
HASHIM YEOP A SANI CJ (MALAYA), MOHAMED YUSOFF SCJ AND WAN YAHYA J
29 OCTOBER 1990

Land Law — Sale of land by public auction — Certificate of sale issued by senior assistant registrar — Purchaser registered as proprietor of land — Application to set aside default judgment and sale of land

Land Law — Caveat — Removal of — Whether title indefeasible — Failure to comply with requirements of Rules of the High Court 1980 and National Land Code 1965 — Rules of the High Court 1980, O 47 r 7 — National Land Code 1965, ss 217, 337 & 340

In this case as a result of a default judgment obtained by one Suppiah against the respondent for failure to pay the full purchase price of the land which had been sold to them by Suppiah, the land was auctioned and purchased by the appellant. A certificate of title had been issued by the senior assistant registrar of the High Court and the appellant had been registered as proprietor of the land. The respondent thereupon applied to set aside the default judgment and the sale of the land and they lodged a caveat against the land. The appellant applied to have the caveat removed. The learned Judicial Commissioner found that on the facts the respondent as caveator had discharged the onus establishing that the caveat should remain pending the disposal of the issues raised [see [1990] 2 MLJ 91].

Held, dismissing the appeal:

(1) It appeared that the provisions of the Rules of the High Court 1980 and of the National Land Code 1965 in relation to the sale in this case had not been followed and applied with and therefore the issue is contentious whether the auction sale of the land by the court is absolute.

(2) On the facts the learned Judicial Commissioner had exercised his discretion correctly as he was satisfied that the balance of convenience showed that it is better to maintain the status quo until trial of the action.

[Bahasa Malaysia summary

Di dalam kes ini berikutan daripada penghakiman ingkar yang diperolehi oleh seorang bernama Suppiah terhadap responden kerana kegagalannya membayar harga pembelian sepenuhnya bagi tanah yang ia telah menjual kepada Suppiah, tanah itu telah dilelong dan diberi oleh perayu. Perakuan hakmilik telah dikeluarkan oleh penolong kanan pendaftar Makamah Tinggi dan perayu telah didaftar sebagai tuanpunya berdaftar tanah itu. Responden kemudiannya telah memohon mengenepikan penghakiman ingkar dan penjualan tanah itu dan ia telah membuat kaveat terhadap tanah itu. Perayu pula telah memohon kaveat itu disingkirkan. Yang arif Pesuruhjaya Kehakiman telah berpendapat bahawa atas fakta kes itu responden sebagai pengkaveat telah menjelaskan beban menunjukan kaveat itu harus dikekalkan hingga keputusan issu-issu yang telah ditimbulkan.

Diputuskan, menolak rayuan itu:

(1) Nampaknya peruntukan-peruntukan Kaedah-Kaedah Mahkamah Tinggi 1980 dan Kanun Tanah Negara 1965 berhubung dengan penjualan tanah itu telah tidak dipatuhi dan digunakan didalam kes ini dan oleh kerana itu issu sama ada jualan lelong tanah itu telah menjadi muktamad boleh dipertikaikan.

(2) Atas fakta-fakta kes ini yang arif Pesuruhjaya Kehakiman telah menggunakan budibicaranya dengan sewajarnya oleh kerana beliau berpuashati imbangan kesesuaian menunjukkan adalah lebih baik status quo diteruskan hingga perbicaraan tindakan itu.]

Cases referred to

1 *Doshi* v *Yeoh Tiong Lay* [1975] 1 MLJ 85 (distd)
2 *Eng Mee Yong & Ors* v *V Letchumanan* [1979] 2 MLJ 212 (folld)

Legislation referred to

National Land Code 1965 ss 217, 337, 340
Rules of the High Court 1980 O 47 r 7

Appeal from: Originating Motion No 25-7-1989 (High Court, Muar)

G Sri Ram (Joseph Yeo and *C Subbayah* with him) for the appellant.
Ng Shew Hor for the respondent.

Cur Adv Vult

Mohamed Yusoff SCJ (delivering the judgment of the court): This appeal concerns the removal of caveat lodged against the land held under Grant No 10726 for Lot No 1379 situated in the mukim of Simpang Kanan, district of Batu Pahat in the state of Johore.

The appellant (caveatee) who sought the removal of the caveat had purchased the land on 14 July 1988 at an auction conducted by the High Court at Muar. The auction of the land had arisen from default judgment obtained by one Mr M Suppiah ('Suppiah') against the respondent (caveator) in Suit No 23-42-1987 for failure

by the respondent to pay the full purchase price of the land which had been sold to them by Suppiah.

By virtue of a certificate of sale issued by the senior assistant registrar of the High Court at Muar dated 13 August 1988, the appellant was registered on the land title as proprietor of the land.

The respondent has since applied to set aside the judgment in default of appearance entered against it and the sale of the land to the appellant consequent to a prohibitory order dated 3 March 1988, issued by the High Court, on the ground that both the writ and the subsequent process for the sale of the land had not been served on it. On 22 November 1988, the respondent also lodged this caveat.

In dismissing the appellant's application the learned Judicial Commissioner in his judgment [see [1990] 2 MLJ 91] held:

> As I see it Katlyn (respondent) has discharged the onus placed on it to establish that the caveat should remain pending disposal of the main issue, namely, who is the true and rightful owner of the land in question.
>
> As I see it there should be a trial to ascertain whether or not Katlyn paid Suppiah for the land. It also has to be judicially determined whether the writ in Suppiah's case was duly served on Katlyn. If the writ was not duly served it would seem that all proceedings in the suit subsequent to the issue of the writ are open to question and liable to be set aside.

The main contention by the appellant's counsel is that as an innocent purchaser under O 47 r 7 of the Rules of the High Court 1980 and the issuance of the certificate of sale by the senior assistant registrar, the sale of the land became absolute. The appellant's title, he argued, in that way has become indefeasible. He further contended that since the respondent's application to set aside the default judgment was made after the issue of the certificate for sale by the senior assistant registrar, the respondent has no more interest in the land.

It is not disputed that s 337 of the National Land Code 1965 ('NLC') requires that the auction sale of the respondent's land for the purpose of satisfying any judgment debt has to be confirmed by an order of the court and that after confirmation the transfer has to be executed by an officer of the court on behalf of the respondent by an appropriate instrument of transfer under the Act.

Section 337 of the NLC provides:

> (1) No sale of any land or interest for the purpose of satisfying any judgment debt shall become absolute until it has been confirmed by an order made pursuant to rules of Court; and any such order shall be sufficient authority for an officer of a court of competent jurisdiction to execute in favour of the purchaser at the sale the appropriate instrument of transfer under this Act in the name, and on the behalf, of the judgment-debtor.
>
> (2) The prohibition imposed by any prohibitory order shall not apply to any such instrument of transfer.

The relevant rules of court pertaining to such confirmation are provided in O 47 r 7(b) and (g) of the Rules of the High Court 1980. Order 47 r 7(b) states:

> The particulars and conditions (of sale) shall be drawn up by the sheriff or by his solicitor, and shall be submitted for the approval of a Judge. At least two clear days' notice in writing of an appointment to obtain the approval of the Judge shall be served on the judgment creditor and judgment debtor at their addresses for service respectively, unless the Judge shall in any case otherwise order.

Order 47 r 7(g) states:

> (i) Where no application is made under paragraph (e) or (f) or where such application is made and disallowed, the Court or a Judge shall make an order confirming the sale, and thereupon the sale shall become absolute: provided that no such order shall be made until after the expiration of one month from the date of the sale;
>
> (ii) Where such application is made and allowed, the Court or a Judge shall make an order setting aside the sale:
>
> Provided that no order shall be made unless notice of the application has been given to all persons affected thereby;
>
> (iii) No suit to set aside an order made under this paragraph shall be brought by any person against whom such order is made;

Paragraphs (e) and (f) referred to in r 7(g), which are not applicable here, relate to an application to set aside the sale by those persons who are affected by the sale and setting aside by the purchaser respectively in circumstances provided therein.

It is also not disputed that these provisions of the rules in the Rules of the High Court 1980 had not been followed and complied with by the appellant. The issue is therefore contentious whether the auction sale of the land by the court on 14 July 1988 is absolute.

Relying on *Doshi* v *Yeoh Tiong Lay*[1] learned counsel for the appellant contended that it is no matter whether the instrument of transfer has no legal effect or void. The fact that the appellant is now a registered proprietor of the land, he argued, is effective to vest an indefeasible title on him.

Section 340 of the NLC speaks of indefeasibility of title and interest and sub-s (2)(b) provides:

> (2) The title or interest of any such person or body shall not be indefeasible —
>
> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
>
> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument;

On sufficiency of instrument of transfer to be effected for registration, the learned counsel on behalf of the respondent contended that s 337 of the NLC requires that appropriate instrument of transfer under the NLC

should be executed on behalf of the judgment debtor and s 217 specifically provides that the transfer under the Act shall be effected by instrument in Form 14A.

He submitted that this requirement was not followed. The senior assistant registrar's certificate of sale embodying the transfer instrument of the land on behalf of the respondent does not follow any specific form provided by the NLC or Rules of the High Court 1980 and it cannot therefore be said that an appropriate instrument sufficient to effect the transfer has been executed.

It is fairly obvious that the present facts are distinguishable from *Doshi* v *Yeoh Tiong Lay*.[1] There, appropriate instrument of transfer in Form 14A was executed by the parties but it was alleged that the attestation clause in the Form was false to the knowledge of the attestor and it was held that the instrument was sufficient to confer registrable interest over the land.

In these arguments, there is, in our view, serious questions to be tried whether the auction sale of the land is absolute having regard to the Rules of the High Court 1980 and whether registration was effected by sufficient instrument to vest indefeasible title on the appellant under the NLC. These questions have to be decided at trial of this suit.

The learned Judicial Commissioner, however, dealt with the facts of the case and not the legal consequence of s 337 NLC and O 47 of the Rules of the High Court 1980 although they were argued before him. He found that the respondent as caveator has discharged the onus establishing that the caveat should remain pending the disposal of the issues raised. He has correctly applied the principle in *Eng Mee Yong & Ors* v *V Letchumanan*[2] and satisfied that the balance of convenience shows that it is better to maintain status quo until trial of the action scheduled in his court.

In our view, on the facts before him, the learned Judicial Commissioner has exercised his discretion correctly and has not acted contrary to recognized principles of law. In this view, this appeal is dismissed with costs here and below. Deposit to respondent to account of taxed costs.

Appeal dismissed.

Solicitors: *C Subbayah & Associates; Leng & Co.*

Reported by *Prof Ahmad Ibrahim*

Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-251-1989
HASHIM YEOP A SANI CJ (MALAYA), MOHAMED YUSOFF SCJ AND WAN YAHYA J
29 OCTOBER 1990

Companies and Corporations — Winding-up — Supporting creditor — Default judgment — Locus standi

Civil Procedure — Default judgment — Good and enforceable judgment until set aside

The appellant company were the contractors to the respondent company for a development project of property owned by the respondent company. The balance of payment for work on the development project was due to the appellant company and they obtained a default judgment against the respondent company. In the meantime a petition for winding-up of the respondent company had been presented by the Morgan Guarantee Trust Co. The appellant company supported the petition as supporting creditor. The respondent company filed a notice to strike out the appellant company as a supporting creditor on the grounds that it had no locus standi to support the petition (see [1989] 3 MLJ 172). The learned trial judge gave judgment for the respondent company as he held that the default judgment was null and void and should be set aside. The appellant company appealed.

Held, allowing the appeal:
The default judgment in this case until set aside is a good and enforceable judgment and the appellant company was perfectly entitled to rely on the default judgment as a basis for its right to be a supporting creditor and should be recognized in the petition as a supporting creditor.

[Bahasa Malaysia summary

Perayu sebuah syarikat adalah pemborang kepada responden yang juga sebuah syarikat bagi projek pembangunan tanah yang dimiliki oleh responden. Baki pembayaran lagi pekerjaan yang dijalankan bagi projek itu telah terhutang kepada perayu dan ia telah mendapat penghakiman ingkar terhadap responden. Dalam pada itu satu petisyen penggulungan syarikat responden telah dikemukakan oleh Morgan Guarantee Trust Co, sebuah syarikat di Amerika. Perayu telah menyokong petisyen sebagai pemiutang penyokong. Responden telah mengemukakan notis untuk membatalkan tindakan perayu sebagai pemiutang penyokong atas alasan ia tidak mempunyai locus standi menyokong petisyen itu (sila lihat [1989] 3 MLJ 172). Hakim yang arif telah membuat keputusan bagi responden oleh kerana beliau berpendapat penghakiman ingkar itu adalah terbatal dan tak sah dan hendaklah diketepikan. Perayu telah membuat rayuan.

Diputuskan, membenarkan rayuan itu:
Penghakiman ingkar di dalam kes ini sehingga ia diketepikan adalah penghakiman yang sah dan yang boleh dikuatkuasakan dan perayu berhak bergantung kepada penghakiman ingkar itu sebagai asas bagi haknya menjadi pemiutang penyokong dan ia seharusnya diiktiraf didalam petisyen itu sebagai pemiutang penyokong.]

Cases referred to
1 *Anlaby & Ors* v *Praetorius* (1888) 20 QBD 174 (refd)
2 *Syarikat Joo Seng & Anor* v *Habib Bank Ltd* [1986] 2 MLJ 129 (distd)